Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

[redacted],
STATE OF ALABAMA,

PETITIONER,

V.

WALLACE H. BONNER,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION

OF

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APPENDIX A

Wallace H. BONNER, Petitioner-Appellant,

v.

Arnold HOLT, Respondent-Appellee.

No. 92-6646.

United States Court of Appeals, Eleventh Circuit.

July 25, 1994.

KRAVITCH, Circuit Judge:

Wallace Bonner is an Alabama prisoner seeking relief pursuant to 28 U.S.C. §2254. He appeals the district court's denial of his petition for a writ of

habeas corpus. For the reasons stated below, we REVERSE and direct that the writ be issued.

Bonner was charged with theft of property in the second degree for shoplifting several cartons of cigarettes from a grocery store. At trial he was found guilty and sentenced to life imprisonment under the Alabama Habitual Felony Offender Act. In his habeas petition Bonner raises three constitutional challenges to his conviction and sentence. We conclude that Bonner's Sixth and fourteenth Amendment right to a trial by jury was violated when extrinsic evidence tainted the jury deliberations and that the error was not harmless. Therefore, we do not address Bonner's other claims.

The facts in this case are not in dispute. Bonner was tried in state court

in Mobile, Alabama in 1988. After the presentation of the case, the jury began deliberations. The jury announced that it had reached a verdict and the foreperson read a verdict of guilt in the open courtroom. The trial judge, immediately following the reading of the verdict, adjudged Bonner guilty and asked the prosecutor, "Is the defendant a habitual offender?" The prosecutor responded in the affirmative and the defense counsel then asked for a poll of the jury. During the poll of the jury it became apparent that a unanimous verdict had not been reached. One of the jurors stated that she did not agree with the verdict of guilt.[1] The court then sent the jury

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[1]Alabama law requires a unanimous verdict in criminal cases. Carter v. State, 103 Ala. 93, 15 So. 893 (1894).

back for further deliberations. Defense counsel moved for a mistrial based upon the fact that Bonner's status as an habitual offender had been revealed to the jury. The judge denied the motion and did not inquire into whether the jury had heard the remark or instruct the jurors to disregard the comment. The jury later returned a verdict of guilt.

The Alabama appellate courts summarily affirmed Bonner's conviction. He then filed a federal habeas corpus petition. The magistrate considering the petition held a hearing at which three jurors testified. Based upon the evidence produced at that hearing, the magistrate concluded that the jurors heard the statement that Bonner was an habitual offender and considered that statement during the second deliberation period. The magistrate, however, concluded that in

light of the overwhelming evidence presented by the state, the error was harmless under the then prevailing standard of Chapman v. California, 387 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The district court affirmed. We disagree.

The district court concluded that Bonner's Sixth Amendment right to a trial by jury was violated. The Sixth Amendment "guarantee of a trial by jury requires the jury verdict to be based on the evidence produced at trial." United Stats v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984) (citing Turner v. Louisiana, 379 U.S. 466, 472, 85 S.Ct. 546, 549-50, 13 L.Ed.2d 424 (1965) and Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)). The state does not challenge the conclusion that a Sixth Amendment violation occurred in this case,

but argues that the error was harmless. Harmless error is a mixed question of law and fact subject to de novo review. Jackson v. Dugger, 931 F.2d 712, 717 (11th Cir.), cert. denied, ___ U.S. ___, 112 U.S. 452, 116 L.Ed.2d 470 (1991).

Since the application of the Chapman harmless error standard by the district court, the Supreme Court has adopted a relaxed harmless error test for habeas corpus cases. Under the new standard, a petitioner is entitled to relief only if the error resulted in "actual prejudice." Brecht v. Abrahamson, ___ U.S. ___, ___, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993) (citing United States v. Lane, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986)). Adopting the standard used for non-constitutional errors, the Supreme Court held that habeas relief is proper only when the error "'had

substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, ___ U.S. at ___, 113 S.Ct. at 1714 (quoting Kitteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)). We review the state's claim of harmless error under the standard announced in Brecht.

Initially we note that when the Supreme Court announced a new standard of review in habeas corpus cases, it did not alter the burden of proving error harmless, which remains with the government. Brecht, ___ U.S. at ___ _ ___ and n. 1, 113 S.Ct. at 1723-24 and n. 1 (Stevens, J. concurring). Although the Chief Justice's opinion contains language that suggests that the habeas petitioner bears the burden of demonstrating that prejudice occurred, see id. ___ U.S. at ___, 113 S.Ct. at 1722, nowhere is the

issue explicitly addressed in the opinion. Further, the majority opinion in Brecht warns against treating as decided issues that are not squarely addressed by the Court. Id. ___ U.S. at ___, 113 S.Ct. at 1718. Justice Stevens, who provided the fifth vote in Brecht, does address the issue, explaining in his concurring opinion that the government still bears the burden of proving that prejudice did not occur. Id. ___ U.S. at ___ _ ___ and note 1, 113 S.Ct. at 1723-24 and note 1. Justice Stevens explains that under Kotteakos, "unless an error is merely 'technical,' the burden of sustaining a verdict by demonstrating that the error was harmless rests on the prosecution. A constitutional violation, of course, would never fall in the 'technical' category." Id. ___ U.S. at ___, 113 S.Ct. at 1723-24 (Stevens, J., concurring) (footnote

omitted). Thus, Kotteakos dictates that the state bear the burden of proving a constitutional error harmless. Additionally, the four dissenting Justices took the position that habeas corpus cases should be governed by the Chapman harmless error standard and therefore advocated the view that the government should bear the burden of proving errors harmless. Id. ___ U.S. ___ _ ___, 113 S.Ct. at 1727-28 (White, J. dissenting, joined by Blackmun and Souter, JJ.); id. ___ U.S. at ___ _ ___, 113 S.Ct. at 1729-30 (O'Connor, J. dissenting). Thus, five members of the Court concluded that the state bears the burden of demonstrating that error was not

prejudicial. That is the law we must follow.[2]

Employing the standard enunciated in Brecht, we conclude that the district court erred in finding that the state demonstrated that Bonner was not prejudiced by the error in this case. The Kotteakos Court explained that the question is not whether the jurors were

> right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may have taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other[s] ... in the total setting.

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[2]The Supreme Court has recently granted certiorari on this issue, O'Neal v. Morris, 3 F. 3d 143 (6th Cir. 1993), cert. granted, ____ U.S. ____, 114 S. Ct. 1396, 128 L. Ed. 2d 70 (1994), to resolve a split in the circuits.

328 U.S. at 764, 66 S.Ct. at 1247-48. Under the highly unusual facts in this case, we are presented with compelling evidence that the error did influenced the outcome of this case. When the jury first retired to deliberate, it did so prior to the error at issue. At the conclusion of the first session of deliberations, one juror was not convinced of Bonner's guilt. At that point Bonner's status as an habitual offender was made known to and was considered by the jury. After the error occurred, the jury returned a unanimous verdict of guilt.[3] Under

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[3]There is nothing in the record that reveals the length of time that the jury deliberated in either the first or the second session of deliberations other than the fact that the unanimous verdict was returned on the same day that the trial began.

the Kottaekos reversible error analysis, courts are asked to speculate on the effect that an error had on the jury's decision. In other words, we must determine whether the results would have been different absent the error. In this case there were two sets of deliberations in which the only difference in the evidence before the jury was the evidence admitted in error. The jury was at first unable to reach a unanimous verdict, but in the second round of deliberations, in which the extrinsic evidence was considered, the jury returned a verdict of guilt. This presents strong evidence that the error in this case had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht, ___ U.S. at ___, 113 S.Ct. at 1714 (quoting Kotteakos v. United States, 328 U.S. at 776, 66 S.Ct. at 1253).

Under the facts of this case, the state has failed to demonstrate that Bonner was not prejudiced by the error.[4] We therefore REVERSE the district court's denial of the petition for habeas corpus and REMAND the case for issuance of the writ.

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[4]Reviewing a similar error, the Ninth Circuit, which places the burden of demonstrating prejudice on the petitioner, nevertheless concluded that juror exposure to inadmissable extrinsic information concerning a defendant's criminal record was reversible error under Brecht. Jeffries v. Blodgett, 5 F. 3d 1180, 1190-91 (9th Cir. 1993). The Jeffries court noted that extrinsic information concerning criminal conduct by the defendant was "'directly related to a material issue in the case and highly inflammatory.'" Id. at 1190 (quoting Dickson v. Sullivan, 849 F. 2d 403, 407 (9th Cir. 1988).

APPENDIX B

[RELEASED: JULY 25, 1994]

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WALLACE H. BONNER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CIVIL ACTION NO.
	)	90-0396-AH-C
	)	
ARNOLD HOLT,	)	
	)	
Respondent.	)	

ORDER

This matter is before the Court on the Report and Recommendation entered by the Magistrate Judge pursuant to 28 U.S.C. §636 (b) (1) (B) [Doc. #23] and the objections thereto filed by the petitioner [Docs. # 26 & 27]. After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a de novo determination of those portions

of the recommendation to which objection is made, the recommendation of the Magistrate Judge made under 28 U.S.C. §636(b)(1)(B), with the following modifications, is ADOPTED as the opinion of this Court.

The petitioner first objects that he did not consent to the Magistrate Judge conducting an evidentiary hearing, that he has not seen a Court Order referring the matter to a Magistrate Judge, and that the Magistrate Judge exceeded his jurisdiction under 28 U.S.C. §636(b)(1)(B) in conducting the evidentiary hearing in this case. [Doc. #26, pp. 1-4] These objections are without merit. Section 636(b)(1)(B) clearly allows an Article III Judge to designate a Magistrate Judge to conduct an evidentiary hearing, with or without the consent of the parties, and to submit proposed findings of fact and

recommendations for the disposition of "applications for post-trial, relief made by individuals convicted of criminal offenses." See also Rule 8(b) (1), Rules Governing §2254 Proceedings ("When designated to do so in accordance with 28 U.S.C. §636(b), a magistrate may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition."). Pursuant to the Court's Standing Order of General Reference dated September 27, 1991, all prisoner cases (except capital cases) filed pursuant to 28 U.S.C. §2254 are automatically referred to a Magistrate Judge without any additional Court action. The petitioner also cites Wingo v. Wedding, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974) in arguing that 28 U.S.C. §2243 requires that the evidentiary

hearing n his case be conducted by a District Court Judge rather than a Magistrate Judge. [Doc. #27] However, assuming that §2243 is applicable to this §2254 case, the Federal Magistrate Act was amended in 1976 to make clear that an evidentiary hearing in a habeas corpus case may be delegated to a Magistrate Judge. See Wright, et al., Federal Practice and Procedure §4261 n. 54 (2d ed. 1988).

The petitioner's second objection is to the Magistrate Judge's rendition of the facts in this case. [Doc. #26, pp. 4-5] The petitioner argues in part that the officer who arrested him saw three cartons of cigarettes in his Food World buggy and found five cartons of cigarettes under the passenger seat of the truck in which he was a passenger. The petitioner also argues that the cartons of cigarettes were

not marked in any way as having come from the Food World, although the Magistrate quoted the testimony of Ron L. Sellers, the store manager, that the cartons were marked with the words "Food World Store 17, ..., 4720 Moffat Road." [T.T. 21] The Court has reviewed the trial transcript and finds that these and the other factual objections made by the petitioner are without merit. With respect to the number of cartons, the Magistrate Judge nowhere found that the officer saw five cartons in the buggy in the store. Moreover, while the officer's testimony at trial indicates that he saw three cartons of cigarettes in the buggy, he thought it possible that the petitioner had already put some cartons under his coat. [T.T. 12, 15] With respect to the markings on the cartons, the petitioner primarily relies on a copy of his Report

of Parole Violation which states that the property stolen was "nonserialized." [Doc. #26, Ex. 6] However, the uncontradicted evidence at trial was that the cartons were marked with the Food World logo.

The petitioner's third objection is to the Magistrate's recommendation that the Court hold the petitioner's extrajudicial statements to have been volunteered information rather than a violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). [Doc. #26, pp. 5-7] Miranda prohibits "custodial interrogation" without proper safeguards. In Rhode Island v. Innis, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980), the Supreme Court held that "interrogation" includes not only express questioning but also its functional equivalent--i.e., "any words or actions on the part of the police (other than those

normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 300-301, 100 S.Ct. at 1689 (holding that statement of officer searching for murder weapon to murder suspect that "it would be too bad if [a] little [girl] would pick up the gun, maybe kill herself," after which the suspect directed officers to murder weapon, was not a Miranda violation). In this case, the Magistrate concluded that there was no "interrogation," so that Miranda was not implicated. The petitioner argues that taking him back to the Food World, where he encountered the store manager and admitted to his crime, before taking him to the police station was done for the purpose of attempting to elicit incriminating statements from him. The Court is in agreement with the

Magistrate Judge and finds that the statements were volunteered by the petitioner rather than having been elicited through interrogation. The officer who apprehended the petitioner clearly testified that the petitioner volunteered his statements to Sellers without anyone questioning him [T.T. 8-12], and Sellers himself corroborated this testimony. [T.T. 19-20] Maine v. Moulton, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985), cited by the petitioner, is inapposite because it involves deliberate elicitation of an incriminating statement by a state agent, and in the instant case Sellers was not a state agent.

The petitioner's fourth objection is to the Magistrate's finding the violation of Alabama's procedural rule regarding exceptions to an oral jury charge to be

either a matter of state law or harmless error. [Doc. #26, pp. 7-8] The Court is satisfied that the matter is an issue of state law. Moreover, while the petitioner asserts that he was prejudiced by the procedural violation, he does not explain the nature of the prejudice, and the Court is of the opinion that if the matter is not one of state law then the error was harmless.

The petitioner's fifth objection is to the Magistrate's finding that the reasonable doubt instruction given at the petitioner's trial was not constitutionally infirm. [Doc. #26, pp. 8-9] The Court, finding Estelle v. McGuire, --- U.S. ---, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) to be controlling, is of the opinion that the recommendation of the Magistrate Judge is correct on this issue.

The petitioner's sixth objection is to the Magistrate's finding that the State provided reasonable notice of its intent to invoke the Alabama Habitual Offender Statute at sentencing or that, if notice was insufficient, then the error was harmless. [Doc. #26, pp. 9-11] The petitioner contends that the alleged failure of the prosecution to notify him of its intent to proceed under the recidivist statute before the sentencing proceeding violated due process of law. The petitioner does not appear to have attacked the State's notice procedures but rather has asserted that the State failed to comply with those procedures. The Court is in agreement with the Magistrate Judge that notice was in accordance with Alabama law, so that there was no failure by the State to follow prescribed procedures and therefore no procedural due process

violation. The Court is also in agreement with the Magistrate Judge that to the extent that the State may have failed to comply with its procedural rules, such failure was harmless error. The petitioner's sixth objection also appears to raise an Eighth Amendment challenge to his life sentence as an habitual offender. Habitual Offender Statutes such as the one at issue are clearly constitutional. Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) [mandatory life sentence imposed under Texas recidivist statute following defendant's third felony conviction (for obtaining $120.75 by false pretenses) did not constitute cruel and unusual punishment].

The petitioner's seventh and final objection is to the Magistrate's finding that the trial court's discussion with the district attorney about the petitioner's

status as an habitual offender in the presence of the jury and before the jury had finished its deliberations was harmless error. [Doc. #26; pp. 11-14] In Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967), the Supreme Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The question, as framed by the Supreme Court in Chapman, is whether "absent the constitutionally forbidden comment[], honest, fair-minded jurors might very well have brought in not-guilty verdicts." Id. at 25-26, 87 S.Ct. at 829. The State has the burden of demonstrating, "beyond a reasonable doubt, that [the constitutional error] did not contribute to [the] conviction[]." Id. As the Court

later explained in Yates v. Evatt, 111 S.Ct. 1884 (1991),

> To say that an error did not "contribute" to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous. ... To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.

Id. at 1893.

Also, the Court is of the opinion that the sequence of events set forth in the Record [R-34 through RR-2] are of prime importance in a determination of this petition. On page R-34 and after the foreperson of the jury had announced that the jury had reached a verdict, and after the foreperson had read the guilty verdict in open court, and after the Court had found the defendant guilty upon the jury's

verdict, the Court inquired as to whether the defendant was a habitual offender. After this, counsel for the defendant requested that the jury be polled. When the jury was polled, one of the jurors, when asked if this was her verdict, replied:

> JUROR: IT WASN'T EXACTLY MINE, SOMETHING RIGHT IN HERE KIND OF GOT ME ON A LITTLE OF THE TESTIMONY BUT I WENT AHEAD.
>
> THE COURT: I CANNOT ACCEPT THE VERDICT UNLESS IT IS A UNANIMOUS VERDICT. SO ARE YOU TELLING THAT IT IS NOT YOUR VERDICT?
>
> JUROR: IT REALLY WASN'T.

Such jurors' responses were given after that juror had heard the judge's question as to whether the defendant was a habitual offender and the prosecutor had replied in the affirmative. It seems to the Court that if such juror was going to be influenced toward bringing in a guilty verdict by the information that the

defendant was a habitual offender, she, after hearing such information, would not have voiced her doubts about the guilty verdict.

The Court is of the opinion that the Magistrate Judge properly applied the harmless error analysis, that the error was unimportant in relation to everything else the jury considered on the issue of the petitioner's guilt or innocence, and that the error complained of was in fact harmless.

Accordingly, all of the petitioner's objections are denied.

DONE this 29th day of June, 1992.

/s/_____
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WALLACE H. BONNER,	:	
Petitioner,	:	
vs.	:	CA 90-0396-AH-C
	:	
ARNOLD HOLT,	:	
Respondent.		

REPORT AND RECOMMENDATION

Wallace H. Bonner, a state prisoner presently in the custody of respondent, has petitioned this Court for federal habeas corpus relief pursuant to 28 U.S.C. §2254. Petitioner is challenging the validity of his June 9, 1988 second-degree theft of property conviction in the Circuit Court of Mobile County, Alabama. Bonner was sentenced to life imprisonment pursuant to the mandatory sentencing

provisions of Alabama's Habitual Felony Offender Statute.[5] See ALA. CODE §13A-5-9(c)(1). The Alabama Court of Criminal Appeals affirmed petitioner's conviction and sentence without written opinion on December 13, 1988; application for rehearing was overruled. The Alabama Supreme Court initially granted certiorari but, on September 29, 1989, the writ was quashed as being improvidently granted.

In his petition before this Court, petitioner raises the following grounds which he claims entitle him to relief:

(1) an extrajudicial statement was admitted in absence of advisement of his Miranda rights;

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[5]This sentence was made to run consecutive with the sentence the defendant was then serving.

(2) contrary to the provisions of Rule 14 of the Alabama Rules of Criminal Procedure, the trial court asked, in the presence of the jury, whether there were any exceptions to the oral charge;

(3) prior to a poll of the jury, which revealed that the verdict was not unanimous, the trial court disclosed that petitioner was an habitual felony offender;

(4) the trial court gave an improper reasonable doubt charge; and

(5) the State failed to provide reasonable notice that it intended to invoke the mandatory sentencing provisions of the Habitual Felony Offender Act.

Respondent admits that petitioner has exhausted his state remedies. Therefore, this case is ripe for a decision by this Court.

This cause is before the Court on the petition, respondent's answer with

attachments, petitioner's amendment with accompanying brief, and the record of the April 30, 1992 evidentiary hearing.[6]

FACTS

While a customer at the Food World on the corner of Shelton Beach and Moffat Roads, Deputy Sheriff Calvin Niehart observed a black male pushing a buggy down an aisle. (See T.T. 4-7) Several cartons of cigarettes were in the top portion of the buggy and other items were in the larger portion of the buggy. (See T.T. 4-5) When Niehart went to the next aisle, he noticed that the cigarettes were not in the buggy and that the black male was walking toward the store's entrance at a

fast pace. (T.T. 5)[7] Niehart informed the manager that the man had stolen some cigarettes. (Id.) Niehart and the manager followed the man out of the store and ordered him to stop. (See id.) The man got in a pick-up truck driven by another black male and the two men left the parking lot at a high rate of speed. (Id.) Niehart got in his patrol car and the driver stopped once the deputy overtook them. (T.T. 6) Niehart got the suspect passenger out first, searched him and then placed him in a Mobile Police Department squad car. (Id.)

Following the arrival of a backup car, the pick-up was searched and five cartons of cigarettes were found under the

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[7]Niehart did not observe the man stick any cigarettes in his pants or coat. (See T.T. 13)

passenger's side of the front seat. (T.T. 7) According to Niehart, the cigarettes found there -- Kools and Salems -- were the same as those he had seen in the buggy at Food World. (Id.)

Both subjects were placed in the Mobile police officers' squad car and transported back to the Food World. (Id.) Niehart identified Bonner as the man he observed taking the cigarettes. (Id.)

Soon after being transported to the Food World, Bonner told the store's manager, Ron L. Sellers, that he took the cigarettes and that his friend had nothing to do with it. (T.T. 11 & 20) Sellers testified that five cartons of cigarettes were returned to the store. (T.T. 20) The manager could not remember the brand of cigarettes returned but stated their approximate value was fifty-five dollars.

(Id.) Sellers testified that the cigarettes were marked with the words "Food World Store 17, . . . , 4720 Moffat Road, " thus indicating that they came from this store. (T.T. 21) The store manager admitted on cross-examination that it was possible that the cigarettes were actually purchased at the Food World at some other time. (T.T. 22)

The defense called no witnesses. The jury returned a verdict finding the defendant "guilty of theft of property in the second degree as charged in the indictment." (T.T. 34) The trial judge, immediately following the reading of the verdict, adjudged the defendant guilty of second-degree theft of property and asked, "Is the Defendant a habitual offender?" (Id.) The Assistant District Attorney, Herman Thomas, replied in the affirmative. (Id.) Defense counsel then asked, that

the jury be polled whereupon the following occurred:

> The Court : Ladies and gentlemen, I must ask each of [you] if this is your individual verdict. As I point to you please indicate to me if it is your verdict.
>
> The Court: Is this your verdict?
>
> Juror : Yes Sir.
>
> The Court: Is this your verdict?
>
> Juror : Yes sir.
>
> The Court: Is this your verdict?
>
> Juror : Yes sir.
>
> The Court: Is this your verdict?
>
> Juror : Yes sir.
>
> The Court: Your verdict?
>
> Juror: It wasn't exactly mine, something right in here kind of got me on a little bit of the testimony but I went ahead.
>
> The Court: I cannot accept the verdict unless it is a unanimous verdict. So are you telling that it is not your verdict?
>
> Juror: It really wasn't.

> The Court: I'm afraid I'm going to have to ask you all to step back there and deliberate further. Your verdict must be a unanimous verdict. It's got to be the verdict of all the jurors. So let me ask you [to] retire and further consider your verdict.

(T.T. 34-35)

The trial judge did not inquire of the jury whether they had heard his question to Mr. Thomas regarding petitioner's habitual offender status or Mr. Thomas' affirmative response. (See T.T. 35-36) The jurors were not charged to disregard the question and response if heard. No inquiry was conducted by the court subsequent to sending the jury back for further deliberations after counsel for the petitioner made his motion for a mistrial.

The jurors concluded their deliberations for a second time on June 9, 1988, and returned a unanimous verdict of

guilty. They were polled for a second time and all affirmed the fact that they had decided Mr. Bonner to be guilty. (Respondent's Exhibit A, pp. RR-2 through RR-3).

Jurors Mrs. Leona T. Marshall and Mrs. Vaughn Sevelle Reed clearly heard the trial judge's question to Mr. Thomas and understood that the defendant had a prior criminal history, although the specifics of the prior criminal history, i.e., the crimes for which he had been convicted or whether there were one or more, was not known to these jurors. One juror, Ms. Regina Walton, did not hear the Judge's question, nor did she understand that defendant's prior criminal history was discussed during the second deliberation period.

It is clear from Mrs. Marshall's testimony that she was the sole juror

voting to acquit. It is equally as clear from the testimony of Mrs. Reed that Mrs. Marshall was not "pressured" by any of the other jurors into reaching her final decision that Mr. Bonner was guilty.

DISCUSSION

A. Extrajudicial Statement.

Petitioner argues that his confession to the store manager, in the presence of Deputy Niehart and Corporal Crane, should have been suppressed because Sellers was a police agent and the police had not yet advised him of his Miranda rights prior to his statement to Sellers.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the Supreme Court held that "the Fifth Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during

'custodial interrogation' without a prior warning." Illinois v. Perkins, 496 U.S. 292, 110 S.Ct. 2394, 2397, 110 L.Ed.2d 243 (1990) (citing Miranda v. Arizona, 384 U.S. at 444, 86 S.Ct. at 1612). The person must be informed "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. at 444, 86 S.Ct. at 1612. The Miranda Court made clear, however, that "volunteered statements of any kind are not barred by the fifth amendment and their admissibility is not affected by our holding today." Id. at 478, 86 S.Ct. at 1630.

The Miranda Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person

has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. In Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), the Supreme Court held that for purposes of Miranda, interrogation occurs whenever a person is "subjected to either express questioning or its functional equivalent." Id. at 300-01, 100 S.Ct. at 1689.

In this case, it is clear that petitioner was in custody when he made the challenged statement to Sellers. See Davis v. Kemp, 829 F.2d 1522, 1535 (11th Cir. 1987), cert.denied, 485 U.S. 929, 108 S.Ct. 1099, 99 L.Ed.2d 262 (1988). It is equally clear, however, that petitioner's statement to Sellers was not in response to questioning by the manager; rather, it was volunteered and made without coercion. Accordingly, the undersigned finds that

the statement was properly admitted into evidence.

B. Exceptions to Oral Charge.

Petitioner next claims that the trial court, in the presence of the jury, asked if there were any exceptions to its oral charge contrary to the provisions of Temporary Rule 14 of the Alabama Rules of Criminal Procedure.

In the jury's presence, the trial judge asked both sides if there were any exceptions to the court's oral charge. (T.T. 32) When defense counsel acknowledged that he had some exceptions to the oral charge, the trial court excused the jury and allowed counsel to make his objections outside the hearing of the jury. (T.T. 32- 34)

Temporary Rule 14 (now Rule 21.2, Ala.R.Crim.P.) provided that "[n]o party

may assign as error the court's giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge, unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objections. . . Opportunity shall be given to make the objection out of the hearing of the jury." Ala. R. Crim. P. 21.2(same).

The undersigned is of the opinion that this issue involves a question of state law and thus is not subject to federal habeas corpus review. See Jones v. Kemp, 794 F.2d 1536, 1540 (11th Cir.), cert.denied, 479 U.S. 965, 107 S.Ct. 466, 93 L.Ed.2d 411 (1986). Furthermore, if indeed defense counsel's statement, within the jury's hearing, that he took exception to the oral charge is a federal

constitutional error, the undersigned deems such error harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see Boyd v. State, 590 So.2d 344, 351 (Ala.Crim.App. 1989)("even had the jury heard and observed the appellant objecting to the trial judge's charges, any prejudice caused would have been harmless error"). The evidence of petitioner's guilt in this case is overwhelming and thus, the undersigned finds that "the error complained of did not contribute to the verdict obtained." 386 U.S. at 2, 87 S.Ct. at 828.

C. Reasonable Doubt Instruction.

Petitioner attacks the trial court's reasonable doubt instruction claiming that the trial judge equated reasonable doubt with "substantial" and "grave" doubt thus suggesting a higher degree of doubt than

is required for acquittal. According to petitioner, "[w]hen those statements are then considered with reference to 'moral certainty' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause."

The pertinent portion of the court's oral charge is as follows:

> The presumption of innocence attends the defendant as a matter of evidence throughout the course of the trial and is sufficient in and of itself to authorize his acquittal. The State must satisfy you that he is guilty and must satisfy you beyond a reasonable doubt. What that phrase means is what the terms suggest, is a doubt for which you can give a reason. It's not a fanciful doubt or a vague or speculative doubt, but a reasonable substantial doubt which may arise from all the evidence, or lack of evidence, or any portion of the evidence. The State is not required to prove the Defendant guilty

> beyond all doubt but beyond all reasonable doubt. If after comparing and considering all the evidence of the case you can say that you have an abiding conviction to a moral certainty of the truth of the charge then you are convinced beyond a reasonable doubt and your duty is to convict. If you cannot say that your duty is to acquit.

(T.T.30)

Contrary to petitioner's arguments, it is clear that the trial court did not equate reasonable doubt with a "grave" doubt although he did say that it is not a "fanciful doubt or a vague or a speculative doubt, but a reasonable substantial doubt." (Id.)

In Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978), the Supreme Court stated that defining reasonable doubt as "a substantial doubt, a real doubt," while confusing is not "in itself reversible error." Id. at 488, 98 S.Ct. at 1936. In Cage v. Louisiana, ____

U.S. ____, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), however, the Supreme Court held that a reasonable juror having heard statements in jury instructions equating a reasonable doubt with a "grave[8] uncertainty" and an "actual substantial doubt"[9] when "considered with the reference to 'moral certainty,' rather than evidentiary certainty," could have "interpreted the instruction to allow a finding of guilt based on a degree of

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[8]The Supreme Court found that the words "'substantial and 'grave', as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Id. at 329-30.

[9]In Cage, the Court held that "[i]n construing the instruction, we consider how reasonable jurors could have understood the charge as a whole." 111 S. Ct. at 329.

proof below that required by the Due Process Clause." 111 S.Ct. at 229-30.

In Estelle v. McGuire, ____ U.S. ____, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), the Supreme Court disapproved of the standard of review language for jury instructions contained in Cage and other cases, and settled on the standard of review enunciated in Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). 112 S.Ct. at 482 n.4. In reviewing jury instructions, federal courts must inquire "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Id. (quoting Boyde, supra, 494 U.S. at 380, 110 S.Ct. at 1198).

In this case, the undersigned finds that given the prefacing of the reasonable doubt language with that of the

presumption of innocence, and the court's statement that reasonable doubt was a reasonable substantial doubt, as well as the court's reemphasis that the State's burden was to prove the defendant guilty beyond all reasonable doubt, there is not a reasonable likelihood that the jury would have concluded that this instruction authorized a finding of guilt based on a lower standard of proof than reasonable doubt.

D. Habitual Felony Offender Act.

Petitioner next claims that he was unconstitutionally sentenced to life imprisonment under Alabama's Habitual Felony Offender Statute because the State did not provide reasonable written notice that it intended to invoke the sentencing provisions of the Act.

In Alabama, at a reasonable time prior to the sentencing hearing, the defendant is to be given notice of the prior convictions upon which the State intends to proceed. Ala.R.Crim.P. 26.6(b)(3)(ii)(1991); see also Ala.R.Crim.P., Temp., 6(b)(3)(ii). However, an accused need not be notified that sentencing will be pursuant to the Habitual Felony Offender Act prior to conviction of the substantive offense. Hinton v. State, 473 So.2d 1125, 1126 (Ala. 1985). Moreover, Alabama courts have evidenced an unwillingness to set a minimum time for such notice. Humber v. State, 481 So.2d 452, 453 (Ala.Crim.App. 1985). "Two days' notice of the sentencing hearing has been held adequate under Rule 6(b)(3)(ii)." Hinton, 473 So.2d at 1126 (citing Holley v. State, 397 So.2d 211 (Ala.Crim.App.), cert.denied, 397 So. 2d

217 (Ala. 1981)). Notice of the State's intention to proceed under the Act is effectuated when the defendant is informed of this fact in open court. Garrett v. State, 480 So.2d 58, 61 (Ala.Crim.App. 1985). Where the defendant is informed of the State's intention to proceed under the Act immediately following the jury verdict and no objection is posed, he is not prejudiced by a sentencing immediately following conviction. Id.

In this case, when defense counsel complained of lack of written notice of the State's intention to proceed under the Act, the district attorney informed the court that he told defense counsel, either at the arraignment or at status, that the defendant had three prior felony convictions. In Alabama, written notice is not required. Hollander v. State, 418 So.2d 970, 972 (Ala.Crim.App. 1982)

(written notice is not required by Rule 6(b)(3)(ii)); see Garrett, supra (notice is effectuated when the defendant is informed of the fact in open court immediately following the jury verdict). Therefore, the undersigned finds that the State gave reasonable notice of its intent to proceed under the Act.

Even if this Court were to find that the State did not give reasonable notice and that such failure, implicated petitioner's liberty interests, see Tasco v. Butler, 835 F.2d 1120, 1123 (5th Cir. 1988), this Court finds that any infringement of petitioner's constitutional rights was harmless under Chapman v. California, supra. The State offered competent evidence that Bonner had three prior felony convictions, and defense counsel responded in the negative at sentencing when asked if there were

"any corrections about the convictions. " See Oyler v. Boyles, 368 U. S. 448, 454, 82 S.Ct. 501, 505, 7 L.Ed 2d 446 (1962)(neither petitioners nor their counsel sought to raise any matters in defense or intimated that a continuance was needed to investigate the existence of any possible defense but rather conceded the applicability of the recidivist statute to the circumstances of their cases). Thus petitioner is not entitled to habeas relief on the basis of this claim.

Extrinsic Evidence. Petitioner's final and most intriguing issue is his claim regarding the trial court's discussion with the district attorney about Bonner's status as an habitual offender before the jury was polled and his failure to inform the jury, after polling revealed that the verdict was not

that of one of, the jurors, to disregard this extrinsic evidence.

In Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967), the Supreme Court held that evidence of a defendant's prior criminal convictions could be introduced for the purpose of enhancement, so long as the jury is instructed that such evidence should not be used or the purpose of determining guilt. See id. at 561, 87 S.Ct. at 652. The Sixth Circuit has held that it is unfair -- and violative of due process -- if evidence of other crimes is admitted without a limiting instruction." Murray v. Superintendent of Kentucky State Penitentiary, 651 F.2d 451, 453 (1981).

The prior conviction "evidence" in this case, unlike the scenario contemplated in Spencer and Murray, supra, was introduced not by the State during its

case in chief, but rather, by the trial judge following some deliberation by the jury. The Sixth Amendment guarantee of a trial by jury "requires the jury verdict to be based on the evidence produced at trial." United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984)(citing Turner v. State of Louisiana, 379 U. S. 466, 472, 85 S. Ct. 546, 549, 13 L.Ed.2d 424 (1965); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)).

> Extrinsic evidence, evidence that has not been subject to the procedural safeguards of a fair trial, threatens such constitutional safeguards as the defendant's right of confrontation, of cross-examination, and of counsel. Id. at 473, 85 S.Ct. at 550. In addition, since such evidence has not been subject to the rules of evidence, it may confuse the jurors, United States v. Howard, 506 F.2d 865, 868 (5th Cir. 1975); Farese v. United States, 428 F.2d 178, 180 (5th Cir. 1970).
>
> When jurors consider extrinsic evidence, a new trial is

> required if the evidence poses a reasonable possibility of prejudice to the defendant. See, e.g., Howard, 506 F.2d at 869; Paz v. United States, 462 F.2d 740, 745 (5th Cir. 1972), cert.denied, 414 U.S. 820, 94 S.Ct. 47, 115 (sic), 38 L.Ed.2d 52 (1973); Farese v. United States, 428 F. 2d at 180. Prejudice from extrinsic evidence is assumed in the form of a rebuttable presumption and the government bears the burden of demonstrating that the consideration of the evidence was harmless. Howard, 506 F.2d at 869. See also Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed.2d 554 (1954); Richardson v. United States, 360 F.2d 366, 369 (5th Cir. 1966).

Id. at 1533-34.

The evidentiary hearing testimony establishes that two of the jurors heard the comment regarding Bonner's habitual felony offender status and according to Mrs. Marshall, the defendant's prior criminal history was considered by the jury during the second deliberation period. It is clear, therefore, that this

Court must assume this extrinsic evidence prejudiced Bonner. Perkins, supra, 748 F.2d at 1533; see Ex parte Smith, 581 So.2d 531, 534 (Ala. 1991)(evidence of prior crimes to show defendant's bad character is presumptively prejudicial). The Court must determine whether consideration of the extrinsic evidence was harmless. Perkins, 748 F.2d at 1533.[10]

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[10]In making this determination, the undersigned has not considered matters occurring during the course of the jury's deliberations, most especially the mental processes of the jurors and subjective testimony elicited at the evidentiary hearing concerning why the jurors voted the way they voted, except that the Court must consider the extrinsic evidence that was brought to the jury's attention. Perkins, supra, 748 F. 2d at 1534 n. 15; United States v. Badolato, 710 F. 2d 1509, 1515 (11th Cir. 1983); United States v. Howard, 506 F. 2d 868, 868 (5th Cir. 1975).

In determining whether the jury's consideration of extrinsic evidence in this case was harmless, the undersigned has looked at Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), discussed earlier in this opinion, and its progeny. In Chapman, the Supreme Court announced the test for courts to employ in determining whether certain constitutional errors are harmless. "The Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Yates v. Evatt, ____ U.S. ____, 111 S.Ct. 1884, 1892, 114 L.Ed.2d 432 (1991)(quoting Chapman, 386 U.S. at 24, 87 S.Ct. at 828). Reversal is mandated if "'"there is a reasonable possibility that the evidence complained of might have contributed to the conviction."'" Yates, 111 S. Ct. at

1892-93 (quoting Chapman, 386 U.S. at 24, 87 S.Ct. at 828, in turn quoting Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed. 2d 171 (1963)).

As recognized in Yates, supra, "[t]o say that an error did not 'contribute' to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous." 111 S.Ct. at 1893. Having heard the testimony of three jurors here, it is impossible for this Court to find that the jurors did not consider the trial court's "habitual felony offender" statement.

"To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." Yates, 111 S.Ct. at 1893; see

Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986) ("we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt"). Thus, to say that extrinsic evidence "did not contribute to the verdict is to make a judgment about the significance of the [evidence] to reasonable jurors when measured against the other evidence considered by those jurors independently of the [extrinsic evidence]." Yates, 111 S.Ct. at 1893.

As stated in Yates, "[b]efore reaching such a judgment, "this Court must first ask "what evidence the jury actually considered in reaching its verdict" and "then weigh the probative force of that

evidence as against the probative force of the [extrinsic evidence] standing alone." 111 S.Ct. at 1893.

In answering either question, a court cannot "conduct a subjective enquiry into the jurors' minds." 111 S. Ct. at 1893. The answer to the first question must come from the State's presentation of its case, as the defense called no witnesses. With regard to the second question, a court must ask whether "the force of the evidence presumably considered by the jury. . . is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [extrinsic prior crimes evidence]. " 111 S. Ct. at 1893.

In Alabama, "[t]he theft of property which exceeds $25.00 in value, and which is taken from or in a building

where said property is sold or stored, constitutes theft of property in the second degree." ALA. CODE (a) §13A-8-4(e) (1982 Replacement Volume). "A person commits the crime of theft of property if he [k]nowingly obtains or exerts unauthorized control over the property of another, with intent to deprive the owner of his property.. . ." ALA. CODE §13A-8-2(1).

The State's evidence in this case establishes that Bonner was in the Food World on the corner of Shelton Beach and Moffat Roads pushing a buggy, the top portion of which contained several cartons of cigarettes and the bottom portion of which contained other items. Deputy Niehart had observed Bonner's buggy containing these items only to see it moments later on another aisle without the cigarettes. Bonner was observed by Niehart

and the store manager walking quickly to the store's entrance. Bonner failed to heed the deputy's order to stop. Bonner jumped into a pick-up truck. The driver left the store's parking lot at a high rate of speed. Niehart pursued the men and in only a few minutes managed to get them to stop. Both men were arrested. A search of the vehicle revealed five cartons of cigarettes, containing the store's number and other identifying marks. The men were transported back to the Food World where Bonner volunteered to the store manager that he alone had taken the cigarettes. The manager testified that the value of the cigarettes taken was approximately $55.00.

These facts clearly establish Bonner's knowing exertion of unauthorized control over Food World's property and his intent to deprive the store of its

cigarettes. Moreover, the evidence clearly establishes that the value of the cigarettes exceeded $25.00. The undersigned thus finds the evidence of petitioner's guilt in this case so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on the evidence would have been the same in the absence of the extrinsic prior crimes evidence. That is, the extrinsic evidence did not contribute to the jury's finding the elements of second-degree theft of property and to the ensuing verdict of petitioner's guilt of the crime charged. Accordingly, the introduction of the extrinsic prior crimes evidence in this case is due to be excused as harmless error.

CONCLUSION

It is the opinion of the Magistrate Judge that Bonner's petition for habeas corpus relief should be denied.

The attached sheet contains important information regarding objections to the report and recommendation of the Magistrate Judge.

DONE this ____ day of May, 1992.

/s/_____
WILLIAM E. CASSADY
UNITED STATES
MAGISTRATE JUDGE

MAGISTRATE JUDGE'S EXPLANATION OF PROCEDURAL RIGHTS AND RESPONSIBILITIES FOLLOWING RECOMMENDATION, AND FINDINGS CONCERNING NEED FOR TRANSCRIPT

1. Objection. Any party who objects to this recommendation or anything in it must, within ten days of the date of service of this document, file specific written objections with the Clerk of this court. Failure to do so will bar a de novo determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. See 28 U.S.C. § 636(b)(1)(C); Lewis v. Smith, 855 F.2d 736, 738 (11th Cir. 1988); Nettles v. Wainwright, 677 F.2d 404 (5th Cir. Unit B, 1982) (en banc). The procedure for challenging the findings and recommendations of the Magistrate Judge is set out in more detail in Local Rule 26(4)(b), which provides that:

Any party may object to a magistrate judge's proposed findings, recommendations or report made under 28 U.S.C. §636(b)(1)(B) within ten (10) days after being served with a copy thereof. **The appellant shall file with the Clerk, and serve on the magistrate judge** and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made and may accept, reject, or modify in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his discretion or where required by law, and may consider the record developed before the magistrate judge, making his own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

A Magistrate Judge's recommendation cannot be appealed to a Court of Appeals;

only the District Judge's order or judgment can be appealed.

2. Transcript (applicable Where Proceedings Tape Recorded). Pursuant to 28 U.S.C. § 1915 and FED.R.CIV.P. 72(b), the Magistrate Judge finds that the tapes and original records in this case are adequate for purposes of review. Any party planning to object to this recommendation, but unable to pay the fee for a transcript, is advised that a judicial determination that transcription is necessary is required before the United States will pay the cost of the transcript.

_____

UNITED STATES MAGISTRATE JUDGE

APPENDIX D

RELEVANT STATUTES

28 U.S.C. Section 2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

APPENDIX E

RELEVANT RULES OF COURT

Rule 11 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. §2254:

The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.